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IN THE

Supreme Court of the United States

October Term, 1957

No. 727

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

ARCHIBALD PALMER,
Attorney for Petitioners.

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When the facts and circumstances, through the admission by trial counsel that he was not familiar with the technical matters which were the gravamen of the entire case and the statement by the individual defendant with regard to said matters, made it apparent at the opening of the trial that the interests of justice required the defendant's active participation in the trial *pro se*, the Trial Court committed serious error in denying the defendant the right to represent himself.

At the commencement of the trial the following ensued, prior to the selection of the jury:

> "Mr. Driscoll: If the Court please, at this time I wish to withdraw as attorney for the individual defendant Francis P. Carey, who requests that he be permitted to defend himself personally.
>
> The Court: Is he a lawyer?
>
> Mr. Driscoll: He is not, your Honor; and I will remain as attorney for the corporation.
>
> The Court: That is a very unusual request. Why is it made?

Mr. Carey: I will explain that, sir. This indictment was returned the middle of last month. The allegations are most technical. The first three weeks of the ensuing time was for a legal motion (that was a motion for an examination of the Grand Jury minutes). The Government did not in any way attempt to expedite that, so that we have a case of a competent layman, with insufficient time to devote himself—

• • •

The Court: Well, I don't care. What I want to impress upon you is that you have very able counsel in Mr. Driscoll, who is fully competent to take care of your affairs.

Mr. Carey: I could see that, sir. I also am in the corporation. I have a great stake in a factual sense. It would be very difficult to coach Mr. Driscoll in two or three weeks which we have had to prepare this case in the technical side. Mr. Driscoll will be faced with Government experts on technical considerations. I do not feel that he is—

The Court: Is your interest contrary to the interest of the corporation?

Mr. Carey: No, sir; it is identical.

The Court: Then I will not release Mr. Driscoll from the assignment. He will appear for both.

Mr. Carey: I would then like to be down as co-counsel with Mr. Driscoll so that I can take into consideration the technical side of some of the evidence.

The Court: You can sit at the counsel table.

Mr. Carey: I would like the right of cross examination of certain witnesses on technical subjects.

The Court: I will see. If the situation occurs for that, I may grant you permission to do it.

Mr. Carey: The only thing involved here is the inability to provide Mr. Driscoll with that background.

The Court: I am not persuaded that this is necessary, in the light of the competence and ability of your counsel. However, you can sit at the counsel table and if there comes a time when it is necessary to cross examine, that I think you should be permitted to do so, I will let you cross examine. Now we will draw a jury.

Mr. Carey: Can I offer an objection or note an objection?
The Court: When?
Mr. Carey: Now.
The Court: Yes.
Mr. Carey: Thank you, sir'' (App. 41a, 42a, 43a).

It appears that in connection with the important statements being made by the defendant he was interrupted so that he did not conclude his statements to the Court. The only inference that could be drawn from the questions of the Court was that if counsel was sufficiently qualified to represent the corporation then he could also represent the individual defendant. What the Trial Court overlooked was the fact that the individual defendant and the attorney could have complemented each other if the defendant, who held himself out to the Court to be qualified to deal with the technical matters, were permitted to represent himself and develop all of the facts with respect to such technical matters and the attorney were permitted to deal with the legal aspects of the case. In such way justice would not have been sacrificed to delicacies in procedure.

The refusal of the Trial Court to permit the defendant to represent himself and, on several occasions during the trial, to cross-examine witnesses with respect to highly technical matter adduced by the prosecution, permeated the entire trial and constituted such error as to affect substantial rights of the defendant.

The determination as to the guilt or innocence of a defendant should not depend upon the skill of an attorney or his technical knowledge of the particular subject involved but should depend upon the truth of the charges made in the indictment. If the truth or falsity of those charges can best be determined by permitting a defendant, who is familiar with the subject, to represent himself, then the refusal to permit such action constitutes an arbitrary abuse of discretion on the part of the Trial Judge and actually

deprives the defendant of the right to obtain a fair trial and of his constitutional right of due process of law, as well as the right to defend himself.

At the opening of the argument before the United States Court of Appeals, Mr. Driscoll, trial counsel, but who was not appeal counsel, was permitted to make a statement to the Court of Appeals. In this statement Mr. Driscoll informed the Court that due to his complete unfamiliarity with chemistry and the difficult technical questions involved, he felt that he had been unable to defend Mr. Carey properly.

A conviction obtained under the circumstances in the case at bar is tantamount to a conviction by default, which has no basis in our criminal jurisprudence. The Trial Court did not remedy the situation by permitting the defendant to sit at the counsel table. This was not a special privilege afforded to this particular defendant but is a privilege accorded to defendants in all criminal cases, and is universally recognized. Whether by doing so this defendant could impart to his counsel sufficient technical knowledge to enable counsel to properly examine and cross-examine witnesses is another question.

It is difficult at times for an assistant trial counsel to coach the trial counsel in submitting evidence or cross-examining witnesses. It is even more so for a layman, particularly when he has a defect in speech such as stammering, to be able, in the course of the presentation of the evidence or the cross-examination of witnesses, to impart information or knowledge of technical matters which require explanation to counsel sufficient for such purposes, particularly where the Court must take judicial notice of the fact that the coaching must be done quietly, clandestinely, and under such circumstances as in the case at bar, which would make it impossible for the defendant to be of any use to trial counsel in the defense of the case. The prosecution, in its memorandum in the United States Court of Appeals, refers to the speech difficulty of the defendant.

The Government, in its brief in opposition to the instant petition, states, in its footnote at page 16, as follows:

> "Petitioners point to the fact that the Armed Forces Board of Contract Appeals denied the government's request for a recovery of some of the money paid under this contract in a civil administrative proceeding. Of course, such a determination, based on whatever evidence was before the Board, is not determinative of the sufficiency of the evidence presented at this trial."

The decision of the Armed Service Board of Contract Appeals reads, in part, as follows:

> "The testimony generally is quite clear to the effect that the chloroform is very sensitive to atmospheric and light conditions, as well as substances with which it comes in contact. There seems to be no question about there being defects in the chloroform, discovered in April or thereafter; but the weak link in the chain of proof comes with the attempt to attribute these defects to the condition *at the time of delivery*. The acceptance of the chloroform after tests, at the time of delivery, is a fact upon which appellant may rely as evidence of its then condition; and it then behooves the Government to show that those tests were in error, or that the defects were latent. Proof of the result of the later tests is not sufficient, as the expert testimony is to the effect that the defective condition could have developed after delivery. In other words, a defective condition in April or later is not inconsistent with an acceptable condition at time of delivery" (App. 346a).

The decision of the Armed Service Board of Contract Appeals shows that when the evidence was competently presented they arrived at a decision directly contrary to that in the criminal proceeding. This is noteworthy because in this civil proceeding the Government only had the burden of establishing its case by a fair preponderance of the evidence whereas in the criminal proceeding the

Government was required to prove its case beyond a reasonable doubt. If the Government was unable to establish misrepresentation by the defendants in connection with the sale of their products by a fair preponderance of the evidence before the Armed Service Board of Contract Appeals, what is their explanation for having obtained a conviction based upon substantially similar evidence where they were required to establish the alleged false and fraudulent representations beyond a reasonable doubt?

The Government, in its brief in opposition to the instant petition, concedes that it has no direct evidence that the defendants tampered with the samples selected by the Government Inspector and sealed by him. However, it attempted to offer indirect proof of the quality of the chloroform at the time of delivery by reference to tests of a sample which had remained on the shelf for more than a year after delivery. This argument completely ignored the defendants' contention that the deviations, if any, appearing in the chloroform submitted for testing by the various government depots long after delivery were caused principally by extremes of temperature in excess of the maximum prescribed by the U. S. P. and by handling, which enabled the contents of the bottles to interact with the Gutmann cap and Filmaco innerseal, none of which factors affected the sample remaining on the shelf in the government laboratory.

It seems intolerable that the Government should persist in demanding that the verdict of guilty stand when it was unsuccessful, in a civil proceeding, in establishing the same charges by a preponderance of the evidence.

Respectfully submitted,

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